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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

v.

DEPARTMENT OF HOMELAND
SECURITY,

Defendant.

) Case No.: 12-cv-5580 PJH

) **DEFENDANT'S NOTICE OF MOTION**
) **AND MOTION FOR SUMMARY**
) **JUDGMENT; MEMORANDUM IN**
) **SUPPORT OF MOTION**

) Date: December 11, 2013

) Time: 9:00 a.m.

) Place: Courtroom 3, 3rd floor

) Judge: Hon. Phyllis J. Hamilton

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v.)	DEFENDANT'S NOTICE OF MOTION
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NOTICE OF MOTION

PLEASE TAKE NOTICE that on December 11, 2013, at 9:00 a.m. in the United States Courthouse at Oakland, California, defendant U.S. Department of Homeland Security ("DHS" or "Defendant"), by and through undersigned counsel, will bring for hearing a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 and Civil L.R. 56 in this Freedom of

1 Information Act (“FOIA”) action. The hearing will take place before the Honorable Phyllis J.
 2 Hamilton in Courtroom 3, on the 3rd floor of 1301 Clay Street, Oakland, CA 94612. The motion is
 3 based on this notice, the memorandum of points and authorities, the accompanying declarations of
 4 Jennie L. Kneedler, Patrick Howard, and Lothar Eckardt (and attached exhibits), all pleadings and
 5 papers filed in this action, and such oral argument and evidence as may be presented at the hearing
 6 on the motion.

7 Defendant respectfully requests that the Court grant its motion for summary judgment
 8 because, as explained in more detail below, defendant conducted a reasonable search for
 9 documents responsive to plaintiff’s FOIA request, properly withheld information from released
 10 records pursuant to statutory exemptions, and reasonably segregated exempt information from the
 11 released records.

12 **MOTION FOR SUMMARY JUDGMENT**

13 Defendant DHS hereby moves for summary judgment on all of the claims in plaintiff’s
 14 Complaint pursuant to Federal Rule of Civil Procedure 56, Civil L.R. 56, and the Freedom of
 15 Information Act, 5 U.S.C. § 552, for the reasons more fully set forth in the following Memorandum
 16 of Points and Authorities.

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **I. PRELIMINARY STATEMENT**

19 This action concerns a FOIA request by plaintiff Electronic Frontier Foundation (“EFF” or
 20 “plaintiff”) to U.S. Customs & Border Protection (“CBP”), a component of DHS, for documents
 21 relating to CBP’s use of unmanned aircraft systems (“UAS”) to assist the operations or activities of
 22 other agencies. Defendant is entitled to summary judgment because CBP has fully complied with
 23 its obligations under FOIA. CBP conducted a reasonable search for records responsive to
 24 plaintiff’s FOIA request, and released responsive records in consultation with plaintiff’s counsel.
 25 Moreover, CBP properly redacted information from the released records pursuant to FOIA
 26 exemption (b)(7)(E) (law enforcement techniques and procedures). Therefore, defendant’s motion
 27 for summary judgment should be granted.

28 **II. BACKGROUND**

In a letter sent by facsimile on June 25, 2012, plaintiff submitted a FOIA request to CBP

1 seeking documents related to CBP's use of UAS. *See* Declaration of Patrick Howard ("Howard
2 Decl.") ¶ 5 & Ex. A. Specifically, plaintiff's FOIA request sought three categories of documents:
3 (1) all agency records created from January 1, 2010 to the present regarding CBP and/or DHS
4 policies or procedures for responding to requests from other agencies for assistance involving the
5 use of UAS, (Category 1); (2) all agency records created from January 1, 2010 to the present
6 regarding records or logs of CBP UAS flights to assist in any operation or activity of another
7 agency, (Category 2); and (3) a copy of the "Concept of Operations for CBP's Predator B
8 Unmanned Aircraft System, FY2010 Report to Congress," (Category 3) ("CONOPS Report"). *See*
9 *id.* In a letter sent to plaintiff on July 9, 2012, CBP acknowledged receipt of plaintiff's FOIA
10 request and assigned a control number to the request. *See id.* ¶ 6 & Ex. B. Plaintiff filed the
11 instant complaint against defendant on October 30, 2012. *See id.* ¶ 7.

12 After this lawsuit was filed, undersigned counsel and counsel for plaintiff conferred
13 numerous times regarding the processing of plaintiff's FOIA request. *See* Declaration of Jennie L.
14 Kneedler ("Kneedler Decl.") ¶ 2. On January 25, 2013, CBP released, in full, the only record
15 responsive to the first category of documents sought in Plaintiff's FOIA request. *See* Howard
16 Decl. ¶ 10. CBP then released a redacted copy of the report identified in category 3 of plaintiff's
17 FOIA request to EFF on April 29, 2013. *See id.* ¶ 19. Where information was redacted, the
18 withholdings were made pursuant to exemption (b)(7)(E) or exemptions (b)(6) and (b)(7)(C). *See*
19 *id.* On September 19, 2013, CBP made a discretionary release to plaintiff of additional information
20 from this report that had previously been redacted. *See id.* ¶ 20.

21 Undersigned counsel also explained to counsel for plaintiff the records CBP had located
22 that were responsive to category 2 of EFF's FOIA request. *See* Kneedler Decl. ¶ 3. Plaintiff then
23 agreed to receive records responsive to category 2 in the form of portions of Daily Reports to the
24 Assistant Commissioner of the Office of Air and Marine ("OAM") reflecting UAS support to other
25 agencies for the dates covered by the FOIA request. *See id.* ¶ 4. CBP released the first round of
26 records responsive to category 2 on May 1, 2013, in the form of a 24-page document containing
27 entries that reflect UAS support to other agencies taken from the Daily Reports for 2010. *See*
28 Howard Decl. ¶ 15. Then, on May 15, 2013, CBP released 145 pages containing entries that reflect

1 UAS support to other agencies taken from the Daily Reports for 2011. *See id.* ¶ 16. Finally, on
 2 May 29, 2013, CBP released 192 pages containing entries that reflect UAS support to other
 3 agencies taken from the Daily Reports for 2012. *See id.* ¶ 17. Where information was redacted
 4 from the Daily Reports excerpts, the withholdings were made pursuant to one more of the
 5 following FOIA exemptions: (b)(6), (b)(7)(C), (b)(7)(D), and (b)(7)(E). *See id.* ¶ 18.

6 After CBP completed its releases of responsive records to plaintiff, undersigned counsel
 7 and counsel for plaintiff conferred in an effort to narrow the areas of dispute. *See Kneedler Decl.*
 8 ¶ 5. Further to these efforts, on July 12, 2013, CBP produced to plaintiff a sample draft *Vaughn*
 9 index covering certain agreed-upon portions of those documents released in response to categories
 10 2 and 3 of plaintiff's FOIA request. *Id.* ¶ 6. CBP then released a supplementary sample draft
 11 *Vaughn* index covering additional pages from the report identified in category 3 of plaintiff's FOIA
 12 request. *Id.* Subsequent to further conferral efforts, the parties narrowed the areas of dispute to the
 13 following withholdings: (1) all redactions of information from the report identified in category 3
 14 of plaintiff's FOIA request made pursuant to exemption (b)(7)(E); and (2) redactions of the
 15 following categories of information from the Daily Reports made pursuant to exemption (b)(7)(E):
 16 (a) location of operation; (b) map of location of operation; (c) supporting agency when the name is
 17 also the location of operation; (d) operational capabilities; and (e) type of operation.¹ *See id.* ¶ 7.

18 **III. LEGAL STANDARD**

19 Summary judgment is appropriate when there is no genuine issue as to any material fact
 20 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "Because
 21 facts in FOIA cases are rarely in dispute, most such cases are decided on motions for summary
 22 judgment." *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 688 (9th Cir. 2012); *see also*
 23 *George v. IRS*, No. C05-0955 MJJ, 2007 WL 1450309, at *2 (N.D. Cal. May 14, 2007), *aff'd* 344
 24 Fed. Appx. 309 (9th Cir. Aug. 17, 2009) (saying that "district courts typically decide FOIA cases
 25 on summary judgment"). A court reviews an agency's response to a FOIA request *de novo*. 5
 26 U.S.C. § 552(a)(4)(B).

27 ¹ CBP initially withheld information under some of the relevant categories pursuant to
 28 Exemptions (7)(D) and (7)(E). The *Vaughn* indices indicate where this occurred. CBP no longer
 asserts Exemption (7)(D) for these categories.

IV. ARGUMENT

A. CBP Conducted a Reasonable Search for Responsive Records

On summary judgment in a FOIA case, the agency must demonstrate that “it has conducted a search reasonably calculated to uncover all relevant documents.” *Lahr v. Nat’l Transp. Safety Bd.*, 569 F.3d 964, 986 (9th Cir. 2009) (quotation omitted). “[A]ffidavits describing agency search procedures are sufficient for purposes of summary judgment . . . if they are relatively detailed in their description of the files searched and the search procedures, and if they are nonconclusory and not impugned by evidence of bad faith.” *Citizens Comm’n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir. 1995) (quotation omitted). “[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*.” *Id.* (quotation omitted) (emphasis in original).

Counsel for plaintiff indicated to the undersigned counsel that plaintiff does not anticipate challenging the adequacy of CBP’s searches, but expected the declaration in support of defendant’s motion for summary judgment to include a couple of paragraphs describing the searches conducted. *See Kneedler Decl.* ¶ 8. The declaration submitted by Patrick Howard, Subject Matter Expert, Team Lead in the FOIA Division, Office of the Commissioner, at CBP more than meets this standard.

As the Howard Declaration states, initially, the CBP FOIA office staff evaluated the documents being requested to determine which offices and systems within CBP were likely to have records responsive to the request. *See Howard Decl.* ¶ 8. Personnel determined that the Office of Air and Marine (“OAM”) was most likely to have records responsive to the request because OAM is responsible for CBP’s UAS program. *See id.* ¶ 9. OAM provides direct air and maritime support to multiple agencies and ensures the success of border protection and law enforcement operations between ports of entry, within the maritime operating areas, and within the nation’s interior. *Id.* OAM personnel then searched for responsive documents for all three categories of information. *See id.*

OAM determined that the only document responsive to category 1 of plaintiff’s FOIA request is a power point presentation outlining CBP procedures for responding to requests from

1 other agencies for assistance using the UAS program. *See id.* ¶ 10. This power point presentation
2 was created in direct response to a DHS Office of Inspector General report, “CBP’s Use of
3 Unmanned Aircraft Systems in the Nation’s Border Security.” That report stated that CBP did not
4 have any procedures in place for determining how to provide assistance to other federal, state, and
5 local law enforcement agencies. *See id.* The record was released in full to EFF on January 25,
6 2013. *Id.*

7 CBP interpreted category 2 of plaintiff’s FOIA request to seek records of all flights of UAS
8 in support of agencies both within DHS and outside federal, state, and local agencies. *See Howard*
9 *Decl.* ¶ 11. One type of document that was determined to be responsive is the Daily Report to the
10 Assistant Commissioner of OAM. *See id.* The first section of this report covers UAS activity, and
11 is organized by location. Under each location are the following fields: “Date,” “In Support of,”
12 “Sorties,” “Flight Hours,” and “Remarks.” *Id.* The entries into these fields are partly based upon
13 flight logs for UAS flights. Those logs are maintained in a DOS-based system from the 1980s. It
14 is not possible to search this system for assistance to outside agencies. *Id.* Therefore, individuals
15 from OAM had to read through each Daily Report for the relevant time period to determine which
16 Daily Reports reflected UAS assistance to other agencies. *See id.* The logs also appeared to be
17 less informative than the Daily Reports. *See id.* Finally, OAM may have been able to provide
18 some (but likely not all) of the underlying flight logs, but it would have been burdensome and time
19 consuming for the agency. *See id.* ¶ 12.

20 Undersigned counsel informed counsel for plaintiff of the above information, and plaintiff
21 agreed to narrow the scope of category 2 of its request to responsive excerpts from the Daily
22 Reports. *See Kneedler Decl.* ¶¶ 3-4. *See also Howard Decl.* ¶ 13. OAM then went through each
23 Daily Report, reviewed the UAS section of each report to determine if any entry reflected UAS
24 support to another agency, and extracted those responsive portions. CBP then compiled the
25 responsive portions of the Daily Reports in three batches, grouped by years 2010, 2011, and 2012.
26 *See Howard Decl.* ¶ 14.

27 Category 3 of plaintiff’s FOIA request sought a copy of a specific report to Congress. CBP
28 located the report, and processed it pursuant to the FOIA. *See Howard Decl.* ¶ 19.

The Howard Declaration shows that CBP conducted a reasonable search. Therefore, the

1 Court should grant summary judgment to DHS on this issue. *See Lane v. Dep't of Interior*, 523
 2 F.3d 1128, 1139-40 (9th Cir. 2008) (granting summary judgment where the “government’s actions
 3 were reasonably calculated to uncover all relevant documents, and it demonstrated the adequacy of
 4 its searches by producing two separate affidavits” (internal citation and quotation marks omitted)).

5 **B. CBP Properly Withheld Information Pursuant to Exemption 7(E)**

6 The FOIA represents a balance struck by Congress “between the right of the public to know
 7 and the need of the Government to keep information in confidence.” *John Doe Agency v. John*
 8 *Doe Corp.*, 493 U.S. 146, 152 (1989) (quotation omitted). Congress recognized “that legitimate
 9 governmental and private interests could be harmed by release of certain types of information and
 10 provided nine specific exemptions under which disclosure could be refused.” *FBI v. Abramson*,
 11 456 U.S. 615, 621 (1982). While these exemptions are to be “narrowly construed,” *Abramson*, 456
 12 U.S. at 630, courts must not fail to give them “meaningful reach and application.” *John Doe*, 493
 13 U.S. at 152.

14 A court may award summary judgment to an agency with regard to the exemptions on the
 15 basis of information provided in affidavits or declarations that describe “the justifications for
 16 nondisclosure with reasonably specific detail, demonstrate that the information withheld logically
 17 falls within the claimed exemptions, and show that the justifications are not controverted by
 18 contrary evidence in the record or by evidence of [agency] bad faith.” *Berman v. CIA*, 501 F.3d
 19 1136, 1140 (9th Cir. 2007) (quotation omitted). “If the affidavits contain reasonably detailed
 20 descriptions of the documents and allege facts sufficient to establish an exemption, the district
 21 court need look no further.” *Lane*, 523 F.3d at 1135-36 (quotations and citations omitted). In
 22 evaluating an exemption claim, a court “must accord substantial weight to [the agency’s]
 23 affidavits.” *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996).

24 FOIA Exemption 7 protects from disclosure “records or information compiled for law
 25 enforcement purposes” when production of the records or information, among other things:

26 (E) would disclose techniques and procedures for law enforcement
 27 investigations or prosecutions, or would disclose guidelines for law
 28 enforcement investigations or prosecutions if such disclosure could
 reasonably be expected to risk circumvention of the law.

5 U.S.C. § 552(b)(7).

As a threshold issue when analyzing Exemption 7, the Court must make a determination as to whether the documents have a law enforcement purpose, which, in turn, requires examination of whether the agency serves a “law enforcement function.” *Church of Scientology Int’l v. IRS*, 995 F.2d 916, 919 (9th Cir. 1993) (quotation omitted). CBP clearly has a law enforcement mandate because it “is the Federal agency principally responsible for the management and security of our Nation’s borders.” *See* Declaration of Lothar Eckardt (“Eckardt Decl.”) Ex. 2 (“CONOPS Report”) at 2. In this Circuit, and in order to satisfy Exemption 7’s threshold requirement, a government agency with a clear law enforcement mandate “need only establish a ‘rational nexus’ between enforcement of a federal law and the document for which [a law enforcement] exemption is claimed.” *Rosenfeld v. DOJ*, 57 F.3d 803, 808 (9th Cir. 1995) (quotation omitted). There is a rational nexus between both the Daily Reports and CONOPS Report and the enforcement of federal law. The Daily Reports contain information regarding CBP’s use of manned and unmanned aircraft resources to further CBP’s mission to secure the Nation’s borders. The CONOPS Report was written in response to language in a House Report requiring CBP to “develop a concept of operations for unmanned aerial systems in the United States national airspace system for the purposes of border and maritime security operations.” Eckardt Decl. Ex. 2 at i, 1.

Once an agency establishes the threshold requirement by demonstrating that the records or information at issue were compiled for law enforcement purposes, the agency must show that releasing the records or information would lead to one or more of the harms identified in subsections (A)-(F).

To withhold information pursuant to Exemption (7)(E), the agency must demonstrate that release of the information “would disclose techniques and procedures for law enforcement investigations or prosecutions,” or would “disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). Courts are divided as to whether the phrase “if such disclosure could reasonably be expected to risk circumvention of the law” applies only to “guidelines” or also applies to “techniques and procedures.” *See, e.g., Asian Law Caucus v. DHS*, No. C 08-00842 CW, 2008 WL 5047839, at *3 (N.D. Cal. Nov. 24, 2008) (noting that courts “have come out on

both sides of the issue” and saying that the Ninth Circuit has not “squarely addressed” it). However, the better reasoned decisions recognize that providing categorical protection to “techniques and procedures” (*i.e.*, not requiring a showing that “disclosure could reasonably be expected to risk circumvention of the law”) is consistent with both the plain meaning of the statute and the history of the amendments to exemption (7)(E) in 1986. *See Allard K. Lowenstein Int’l Human Rights Project v. DHS*, 626 F.3d 678, 681 (2d Cir. 2010) (finding that the “sentence structure of Exemption (b)(7)(E)” and “basic rules of grammar and punctuation dictate that the qualifying phrase modifies only the . . . ‘guidelines’ clause” and that “[a]ny potential ambiguity in the statute’s plain meaning is removed . . . by the history of the statute’s amendments”). *See also*, *e.g.*, *Durrani v. DOJ*, 607 F. Supp. 2d 77, 91 (D.D.C. 2009) (quotation and citation omitted) (techniques and procedures entitled to categorical protection under (7)(E)).

The withholdings in the Daily Reports and the CONOPS Report are proper because they “would disclose techniques and procedures for law enforcement investigations or prosecutions.” Even if a showing that “disclosure could reasonably be expected to risk circumvention of the law” were required to protect these “techniques and procedures” from disclosure, DHS would still be entitled to summary judgment. *See Asian Law Caucus*, 2008 WL 5047839, at *3-5 (finding it unnecessary to determine whether “circumvention” phrase applied to all of (7)(E) because defendant carried its burden to justify non-disclosure under either interpretation). “[T]he text of exemption 7(E) is much broader” than other exemptions that “set a high standard.” *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1194 (D.C. Cir. 2009). “Rather than requiring a highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the [agency] ‘demonstrate[] logically how the release of [the requested] information might create a risk of circumvention of the law.’” *See id.* (quotation omitted). Therefore, 7(E) “exempts from disclosure information that could *increase the risks* that a law will be violated or that past violators will escape legal consequences.” *See id.* at 1193 (emphasis in original). The information withheld from the Daily Reports and the CONOPS Report was properly withheld because it could increase the risks that a law will be violated.

1. CBP Properly Withheld Information from the Daily Reports

Plaintiff agreed to receive records responsive to category 2 of its FOIA request in the form

of portions of Daily Reports to the Assistant Commissioner of OAM reflecting UAS support to other agencies. *See* Kneedler Decl. ¶¶ 3-4;² Howard Decl. ¶ 13. The first section of the Daily Report covers UAS activity, which is organized by location. Under each location are the fields: “Date,” “In Support of,” “Sorties,” “Flight Hours,” and “Remarks.” *See* Howard Decl. ¶ 11. The Daily Reports contain information regarding CBP’s use of manned and unmanned aircraft resources to further CBP’s mission to secure the Nation’s borders. Therefore, there is a rational nexus between CBP’s enforcement of federal law and the information contained in the Daily Reports. *See Rosenfeld*, 57 F.3d at 808. CBP released 361 pages of responsive portions of the Daily Reports for the years 2010-2012. Where information was redacted, the withholdings were made pursuant to one or more of the following exemptions: (b)(6), (b)(7)(C), (b)(7)(D) and (b)(7)(E). *See* Howard Decl. ¶¶ 15-18.

Counsel for plaintiff informed undersigned counsel that plaintiff will not challenge any redactions in the Daily Reports made pursuant to exemptions (b)(6) or (b)(7)(C). *See* Kneedler Decl. ¶ 9. CBP redacted the following categories of information from the Daily Reports pursuant to exemptions (7)(D) and/or (7)(E): (a) date of operation; (b) length of flight; (c) specifics about a case; (d) UAS capabilities; (e) supporting agency; (f) location of operation; (g) time of operation; (h) call sign; (i) type of operation; (j) name of operation; (k) operational capabilities; and (l) map of location of operation. *See* Eckardt Decl. ¶ 8. Plaintiff challenges the withholding of the following categories of information only: (1) location of operation; (2) map of location of operation; (3) supporting agency when the name is also the location of operation; (4) type of operation; and (5) operational capabilities. *See id* ¶ 9; Kneedler Decl. ¶ 7. These categories of information were properly withheld pursuant to Exemption (7)(E) because release of the information would disclose techniques and procedures for law enforcement investigations and could increase the risks that a law will be violated

Location Redactions: CBP has redacted from the Daily Reports information that reveals the

² The parties have agreed that, for purposes of evaluating defendant’s exemption claims, CBP will submit to the Court a representative sample of the excerpts from the Daily Reports that were produced in response to category 2 of plaintiff’s FOIA request. *See* Kneedler Decl. ¶ 10. These excerpts, as well as *Vaughn* indices that identify and explain each redaction in the excerpts, are organized by year and attached as Exhibit 1 to the Eckardt Declaration.

1 particular geographic location where a UAS operated during a given flight, pursuant to exemption
 2 (b)(7)(E). *See* Eckardt Decl. ¶ 11 & Ex. 1. As the Eckardt Declaration explains, releasing the
 3 geographic location of a specific operation would show where OAM has clearance to fly. *See id.*
 4 If CBP were required to disclose this information for all of the Daily Reports, one could piece
 5 together the locations where CBP UAS operate or do not operate. *See id.* It would also show the
 6 frequency throughout the year that the UAS operate in a given geographic location. *Id.*
 7 Knowledge of this information would reveal the law enforcement priorities of CBP and other
 8 supporting agencies, as well as OAM techniques for supporting law enforcement investigations.
 9 This would present a serious threat to future law enforcement investigations and would risk
 10 circumvention of the law. *See id.* *See also Lewis-Bey v. DOJ*, 595 F. Supp. 2d 120, 138 (D.D.C.
 11 2009) (details of ATF electronic surveillance techniques, including the specific location where they
 12 were employed, were exempt from disclosure pursuant to (7)(E)). Moreover, knowledge of the
 13 location of the operation, in combination with the date of the operation, would allow targets of
 14 investigations to determine the government's awareness of their illegal activities. Eckardt Decl.
 15 ¶ 11. Releasing this information would reveal that CBP is aware of the illegal activities taking
 16 place in a particular location and would impede ongoing enforcement activities. *Id.* *See also*
 17 *Lewis-Bey*, 595 F. Supp. 2d at 138 (details of the specific timing of when particular ATF electronic
 18 surveillance techniques were used was properly withheld pursuant to exemption (7)(E)).

19 CBP has also redacted from the Daily Reports maps that show the location of a particular
 20 UAS operation, pursuant to exemption (b)(7)(E). Eckardt Decl. ¶ 12. The maps show the exact
 21 locations where OAM is operating. *Id.* CBP withheld the maps for the same reasons it withheld
 22 the location of operation. *See id.*

23 Although EFF is not challenging the withholding of information in the Daily Reports that
 24 identifies the name of the supporting agency pursuant to (7)(E),³ there are some supporting

25 ³ On September 25, 2013, CBP provided to plaintiff a list of agencies that received UAS
 26 support from CBP based on the information in the Daily Reports. The list is broken out by year
 27 and includes the number of times per year that the agency was supported. The list includes the full
 28 names of each entity supported, with the exception of county sheriff's offices. In those cases, the
 name of the county must remain redacted to preserve the locations of the operations. EFF
 continues to challenge the redaction of the names of those counties on the list, under the category
 "location of operation." *See* Kneedler Decl. ¶ 11.

1 agencies whose names include the location of the agency. Eckardt Decl. ¶¶ 13-14. For example,
 2 some Daily Reports list that assistance was provided to “X” County Sheriff’s Office. *Id.* EFF
 3 continues to challenge those redactions where the portion of the agency name that is withheld
 4 would also reveal the location of the operation at the county or local level. *See id.* Releasing this
 5 information would reveal a considerably targeted, precise location where OAM operates and is
 6 therefore exempt from disclosure under (7)(E) for the same reasons as the location of operation
 7 category. *See id.*

8 **Type of Operation:** CBP has also withheld information from the Daily Reports pertaining to the
 9 type of operation being conducted by a particular UAS at a particular time. Eckardt Decl. ¶ 15.
 10 This information is withheld pursuant to Exemption (b)(7)(E) because it reveals CBP’s techniques
 11 and procedures for dealing with a particular type of operation. *Id.*; *see also Lewis-Bey*, 595 F.
 12 Supp. 2d at 138 (details of ATF electronic surveillance techniques, including the circumstances
 13 under which the techniques were used, were properly withheld under (7)(E)); *Durrani*, 607 F.
 14 Supp. 2d at 91 (ICE surveillance techniques not known to subjects or potential subjects of an
 15 ongoing investigation were properly withheld pursuant to (7)(E)). In addition, if the type of
 16 operation were linked to the location of the operation, it would also demonstrate CBP’s knowledge
 17 of certain threats to a particular location and would demonstrate the agency’s priorities in a certain
 18 location. Eckardt Decl. ¶ 15. Therefore, revealing information regarding the type of operation
 19 would enable persons to deduce ways to circumvent CBP’s law enforcement efforts. *See id.*

20 **Operational Capabilities:** CBP has also withheld information from the Daily Reports related to
 21 operational capabilities pursuant to exemption (b)(7)(E). *See id.* ¶ 16. Operational capabilities
 22 include both the office capabilities within CBP and OAM, as well as the UAS capabilities (for
 23 example the ability of OAM law enforcement UAS cameras to identify narcotics bundles or
 24 weapons carried by smugglers). *Id.* Releasing the details of OAM and UAS capabilities would
 25 disclose the techniques and procedures that CBP employs for particular investigative and
 26 enforcement purposes as well as vulnerabilities in these techniques and procedures. *Id.* Although
 27 some UAS vulnerabilities have been made publicly available, the exact contours of their abilities
 28 and limitations are not publicly known. *Id.* Public awareness of the exact capabilities could
 increase the risks that a law will be violated. *See id.*

2. CBP Properly Withheld Information from the CONOPS Report

Category 3 of EFF's FOIA request sought a particular report to Congress, entitled "Concept of Operations for CBP's Predator B Unmanned Aircraft System: Fiscal Year 2010 Report to Congress" ("CONOPS Report"). A copy of the report with the claimed withholdings is attached at Exhibit 2 to the Eckardt Declaration. *See* Eckardt Decl. ¶ 17. The CONOPS Report was compiled in response to language in Section 544 of House Report 111-298 accompanying the Fiscal Year 2010 Department of Homeland Security Appropriations Act, Pub. L. No. 111-83. *See id.*; *id.* Ex. 2 at i, 1. Section 544 required the Secretary of Homeland Security to "develop a concept of operations for unmanned aerial systems in the United States national airspace system for the purposes of border and maritime security operations." *Id.* Ex. 2 at 1. The report "articulate[s] the employment concepts and high-level capabilities required for a UAS to be used in current and future OAM operations in direct support of U.S. Department of Homeland Security (DHS) missions, and in coordinated operations with other Federal, state, local, and tribal agencies." *See id.* at ii. Therefore, there is a rational nexus between CBP's enforcement of federal law and the information contained in the CONOPS Report. *See Rosenfeld*, 57 F.3d at 808. EFF challenges all categories of information redacted from the report pursuant to exemption (b)(7)(E). *See Kneedler Decl.* ¶ 9.⁴ A *Vaughn* index identifying and explaining each instance where the following

⁴ The inclusion of the information in a report to Congress does not waive CBP's ability to withhold the information from disclosure under FOIA. *See Murphy v. Dep't of the Army*, 613 F.2d 1151, 1156 (D.C. Cir. 1979) ("[T]o the extent that Congress has reserved to itself in section 552(c) [now 552(d)] the right to receive information not available to the general public, and actually does receive such information pursuant to that section . . . no waiver occurs of the privileges and exemptions which are available to the executive branch under the FOIA with respect to the public at large."). Moreover, the report was required by language in a House Report. *See* Eckardt Decl. Ex. 2 at i, 1. Each page of the report contains a header that states "FOR OFFICIAL USE ONLY – LAW ENFORCEMENT SENSITIVE", as well as a footer saying that the document is for official use only because it contains information that may be exempt under FOIA, and is not to be released to persons without a valid "need to know" without prior approval of an authorized DHS official. *See id.* Ex. 2. Under such circumstances, CBP did not waive a claim that portions of the report are exempt from disclosure under FOIA. *See Rockwell Int'l Corp. v. DOJ*, 235 F.3d 598, 604 (D.C. Cir. 2001) (exemption (b)(5) claim for documents not waived by disclosure to congressional subcommittee because the subcommittee agreed not to make them public); *Bowen v. FDA*, 925 F.2d 1225, 1228-29 (9th Cir. 1991) (exemption 7(E) claim not waived because of limited disclosure in testimony at criminal trial or limited release to professional chemists' community);

categories of information were redacted is attached at Exhibit 2. Eckardt Decl. ¶ 17.

Gap analysis: These redactions identify and explain the gaps in homeland security and operational capability in monitoring that are addressed by OAM with the UAS program. *Id.* ¶ 18. Some gap analyses are tables showing gaps, others are written explanations of the gaps. *Id.* The *Vaughn* index provides further information regarding the type of information redacted in each withholding. *See id.* The redacted information would reveal the specific areas that present difficulty to the agency in detecting criminal activity. Releasing this information would reveal the program's vulnerabilities and would therefore risk circumvention of the law. *See id.*

Target List: The target list on page 25 of the CONOPS Report shows OAM priorities in a particular domain and shows the UAS capabilities in addressing these targets. *Id.* ¶ 19. Releasing this information would reveal law enforcement techniques used by CBP, and knowledge of this information would risk circumvention of the law by those who wish to avoid detection. *See id.*

Airspace Restrictions & Operational Challenges: This information identifies certain restrictions and limitations in the UAS program and identifies certain operational challenges in a particular geographical area. *See* Eckardt Decl. ¶ 20. Releasing details of the airspace being monitored would disclose techniques for law enforcement investigations and knowledge of the restrictions would risk circumvention of the law. *See id.* The redacted information in this category also explains the law enforcement techniques OAM uses to address the operational challenges identified. *Id.* It is logical to conclude that knowledge of these enforcement techniques would risk circumvention of the law. *See id.*

Map Showing Airspace Restrictions and Law Enforcement Techniques: CBP withheld a map showing airspace restrictions on page 60 of the CONOPS Report. Eckardt Decl. ¶ 22. In addition to airspace restrictions, the map also shows OAM's management of the airspace in a particular region. *Id.* It illustrates the law enforcement techniques OAM uses to address the challenges identified in the redaction for "Airspace Restrictions & Operational Challenges" that also appears

Florida House of Representatives v. Dep't of Commerce, 961 F.2d 941, 946 (11th Cir. 1992) (where disclosure to Congress was not voluntary, exemption (b)(5) claim was not waived). *Cf. FBI v. Abramson*, 456 U.S. 615 (1982) (information contained in records originally compiled for law enforcement purposes does not lose exempt status if the information is reproduced or summarized in a new document prepared for other than law enforcement purposes).

1 on page 60 of the Report. *Id.* Releasing this map would therefore risk circumvention of the law.
2 *See id.*

3 ***Airspace Restrictions:*** This information shows the airspace in which OAM has authority to
4 operate. *See* Eckardt Decl. ¶ 21. Similar to the location of information category in the Daily
5 Reports, by knowing the areas in which OAM has the authority to operate, one would be able to
6 identify the geographical areas in which OAM does not operate, which directly affects law
7 enforcement techniques used in the region. *See id.*

8 ***Identification of a Threat:*** The information redacted under this classification on page 48 of the
9 report identifies a particular narcotics threat in a specific area. Eckardt Decl. ¶ 23. Releasing this
10 information would reveal that CBP is aware of this threat and the techniques CBP uses to address
11 this threat. *Id.* This would impede ongoing enforcement activities and would risk circumvention
12 of the law. *Id.*

13 ***Analysis of a Threat:*** The information redacted under this classification analyzes a particular threat
14 in one region. Eckardt Decl. ¶ 24. It explains OAM capabilities and vulnerabilities to address the
15 threat, and explains the law enforcement techniques and procedures used to identify the threat. *Id.*
16 Releasing this information would reveal that CBP is aware of the threat, what OAM is able to do to
17 address the threat, and OAM limitations in addressing the threat. *See id.* It is logical to conclude
18 that knowledge of this information would risk circumvention of the law. *See id.*

19 ***Targeting Priorities and Techniques:*** The information redacted under this classification identifies
20 a particular area of interest in a geographic location and identifies law enforcement techniques to
21 best address the known threat. Eckardt Decl. ¶ 25. Releasing this information would reveal that
22 CBP is aware of this type of threat and the techniques being used to address it. *Id.* This would
23 impede ongoing enforcement activities and could increase the risks that a law will be violated. *See*
id.

24 ***UAS Capabilities:*** Releasing this information would disclose techniques for law enforcement
25 investigations based on UAS capabilities. *See* Eckardt Decl. ¶ 26. Although some UAS
26 capabilities have been made publicly available, the exact contours of their abilities and limitations
27 are not publicly known. *Id.* Knowledge of the exact capabilities and limitations would enable
28 individuals to circumvent CBP law enforcement efforts. *See id.*

C. CBP Has Reasonably Segregated Exempt Portions of the Responsive Records

FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). Plaintiff has been provided with all segregable, non-exempt information from the documents that are responsive to the request and subject to the FOIA. *See* Howard Decl. ¶ 21. CBP reviewed the documents released to plaintiff, line-by-line, to identify information exempt from disclosure or for which a discretionary waiver of exemption could apply. *See id.* This is evidenced by the fact that CBP did not withhold any records from plaintiff in full. Moreover, most of the pages from the documents released to plaintiff contain a combination of both redacted and un-redacted information. *See id.* Therefore, CBP reasonably segregated the exempt portions of the responsive records. *See Asian Law Caucus*, 2008 WL 5047839 at *6 (defendant carried burden of segregating non-exempt information where redactions often consisted of single sentences, clauses, or words and pages withheld in full contained small portions of non-exempt material that was inextricably intertwined with exempt information).

V. CONCLUSION

Defendant’s motion for summary judgment should be granted for the reasons articulated in this memorandum.

DATED: September 25, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2013, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

Executed on September 25, 2013, in Washington, D.C.

/s/ Jennie L. Kneedler
Jennie L. Kneedler